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Public Prosecutor v Leslie Spenser

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HIGH COURT (MIRI) — CRIMINAL TRIAL NO MY-45A–1/4 OF 2015
MAIRIN IDANG JC
1 AUGUST 2017

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Criminal Law — Dangerous Drugs — Offences — Trafficking in dangerous drugs — Drugs found in bag checked in by accused person — Whether accused person had knowledge of drugs — Whether accused person had custody and control over bag which had already been checked in — Whether accused person was an innocent carrier — Dangerous Drugs Act 1952 s 39B(1)(a)

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The accused was charged for the offence of trafficking in dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The accused was arrested at the Miri Airport as the bag, which he had checked in, showed suspicious looking contents. Six other bags checked in on the same flight led to the discovery of similar contents which were confirmed to be methamphetamine. At the commencement of the trial, the prosecution tendered its opening statement ('OS') that the prosecution will prove that the accused was in possession of the said dangerous drugs at the material time. To prove the element of possession of the said dangerous drugs, the prosecution will rely on direct evidence. To prove the element of trafficking, the prosecution will rely on the presumption under s 37(d) of the DDA. The prosecution also stated that the prosecution would also rely on the scientific and circumstantial evidence. The accused argued that the prosecution failed to establish a prima facie case against the accused as he had no knowledge of the drugs and further, he did not have custody or control of the bag where the drugs were found. The accused also submitted that he was an innocent or mere carrier as the bag was only given to him at the aiport by his boss, David. David told the accused that the bag contained birds' nest.

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Held, acquitting and discharging the accused:

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(1) Since the prosecution had tendered its OS: 'to prove the element of possession of the said dangerous drugs, the prosecution will rely on direct evidence', the prosecution should not now turn around and submit that it was also relying on the presumption under s 37(d) of the DDA. In doing so, the prosecution had not only misled the court but it would also be unfair and unjust to the accused (see paras 13–14).

I

(2) When the accused was arrested, he no longer had the bag as he had already checked it in. The accused could not have the custody or control of the bag. In fact, when the bag was retrieved, the accused no longer had

physical custody or control over the same as the bag was already under the custody and control of the police (see paras 21 & 26).

(3) The prosecution had failed to prove possession and trafficking. There was no prima facie case established and the accused was acquitted and discharged. The accused did not know of the nature of the drugs found in the bag. There were no fingerprints of the accused on the plastic containing the drugs. There were also no clothing of the accused found in the bag. The accused had no reason not to believe that the bag contained bird nest because this was what David had told the accused. David was in contact with the accused as the evidence of the forensic reports on the accused's handphones showed. There was strong inference that the bag belonged to David (see para 61).

[Bahasa Malaysia summary

Tertuduh dituduh atas kesalahan pengedaran dadah berbahaya, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('SDB'). Tertuduh ditangkap di Lapangan Terbang Miri apabila begnya, yang diperiksa, mempamerkan kandungan yang mencurigakan. Enam beg lain yang turut dicheck in dalam penerbangan yang sama membawa kepada penemuan kandungan yang sama yang kemudian disahkan menjadi methamphetamine. Pada pemulaan percubaan, pihak pendakwaan memfailkan pernyataan pembukaannya ('OS') bahawa pendakwaan akan membuktikan bahawa tertuduh memiliki dadah berbahaya tersebut pada masa yang material. Untuk membuktikan unsur milikan dadah berbahaya tersebut, pendakwaan akan bergantung pada keterangan langsung. Untuk membuktikan unsur pengedaran, pendakwaan akan bergantung pada anggapan bawah s 37(d) DDA. Pihak pendakwaan juga menyatakan akan bergantung kepada keterangan saintifik dan ikut keadaan. Tertuduh berpendapat bahawa pihak pendakwaan gagal membuktikan kes prima facie terhadap tertuduh kerana dia tidak tahu tentang dadah tersebut dan selanjutnya, dia tidak mempunyai hak jagaan atau kawalan beg di mana dadah tersebut ditemui. Tertuduh juga mengemukakan bahawa dia seorang pembawa tidak bersalah atau hanya pembawa beg tersebut kerana ia hanya diberikan kepadanya di lapangan terbang oleh bosnya, David. David memberitahu tertuduh bahawa beg tersebut mengandungi sarang burung.

Diputuskan, melepaskan dan membebaskan tertuduh:

(1) Memandangkan pihak pendakwa memfailkan OSnya: 'untuk membuktikan unsur milikan dadah berbahaya tersebut, pihak pendakwaan akan bergantung kepada keterangan langsung', pihak pendakwaan tidak boleh menukar dan mengemukakan bahawa ia juga bergantung pada anggapan di bawah s 37(d) ADB. Dengan berbuat demikian, pihak pendakwaan bukan sahaja mengelirukan mahkamah tetapi juga tidak adil kepada tertuduh (lihat perenggan 13–14).

(2) Apabila tertuduh ditangkap, dia tidak lagi memiliki beg itu kerana dia telah check in. Tertuduh tidak mungkin mempunyai jagaan atau kawalan beg tersebut. Malah, apabila beg tersebut diambil, tertuduh tidak lagi mempunyai jagaan atau kawalan fizikal atasnya kerana beg tersebut bawah jagaan dan kawalan polis (lihat perenggan 21 & 26).

(3) Pihak pendakwaan gagal membuktikan milikan dan pengedaran. Tiada kes prima facie dibuktikan dan tertuduh dilepaskan dan dibebaskan. Tertuduh tidak mengetahui jenis dadah yang terdapat dalam beg tersebut. Tiada cap jari tertuduh pada plastik yang mengandungi dadah. Tidak ada pakaian milik tertuduh yang ditemui di dalam beg tersebut. Tertuduh tidak mempunyai alasan untuk tidak mempercayai bahawa beg tersebut mengandungi sarang burung kerana inilah yang diberitahu oleh David kepadanya. David berhubung dengan tertuduh kerana ini ditunjukkan dalam laporan forensik telefon bimbit tertuduh. Terdapat kesimpulan kukuh bahawa beg tersebut milik David (lihat perenggan 61).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 886–1075

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237; [1956] 1 LNS 17, HC (refd)
Chukwudi Hassan lwn Pendakwa Raya [2015] MLJU 847; [2015] 8 CLJ 353, CA (refd)
Emmanuel Yaw Teiku v PP [2006] 5 MLJ 209; [2006] 3 CLJ 597, FC (refd)
Gollapa Avana Naik & Ors v The State [1968] Cri LJ 929 (refd)
Jamuna Chaudhary & Ors v State of Bihar [1974] 3 SCC 774 (refd)
Lim Hock Boon v PP [2007] 1 MLJ 46; [2007] 4 CLJ 114, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Modjtaba Hosseinzadeh Majid v PP and another appeal [2016] 2 MLJ 284, CA (refd)
Ouseng Sama-Ae v PP [2011] 4 MLJ 756; [2008] 1 CLJ 337, CA (refd)
PP v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)
PP v Goh Hoe Cheong [2006] MLJU 468; [2007] 7 CLJ 68, HC (refd)
Prasit Punyang v PP [2014] 4 MLJ 282; [2014] 1 MLRA 387, CA (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Lin Lian Chen [1991] 1 MLJ 316, HC (refd)
PP v Mohammad Reza Aslanzad & Anor and another appeal [2015] MLJU 2216, CA (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)

PP v Salleh bin Zakaria & Anor ; [2010] 4 MLJ 25; [2010] 4 CLJ 671, CA (refd)
Samundee Devan a/l Muthu Kerishnan v PP [2010] 2 MLJ 607; [2010] 3 CLJ 269, FC (refd)
Teoh Hoe Chye v PP Yeap Teong Tean v PP [1987] 1 MLJ 220, SC (refd)
Toh Ah Loh and Mak Thim v Rex [1949] 1 MLJ 54; [1948] 1 LNS 72, HC (refd)
Uchenna Paul Nwokolo v PP [2015] MLJU 692, CA (refd)
Wong Nam Loi v PP [1997] 3 MLJ 795; [1998] 1 CLJ 37, CA (refd)

Legislation referred to

Dangerous Drug Act 1952 ss 2, 37, 37(d), (da), 37B, 39B, 39B(1)(a), (2)
Criminal Procedure Code s 180, 180(1), (4)

Musli Ab Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the complainant.
Shikh Rajjish Ahmad (Shad & Partners Advocates) for the accused.

Mairin Idang JC:

[1] On the 4 December 2014 around 10.35 am, PW9 (Sgt Alwi bin Mustapha), an auxiliary police sergeant who was manning the scanning machine on the ground floor of the Miri Airport saw the accused and a Chinese man bringing their respective trolley bags. PW9 noticed their bags had security stickers though not scanned. PW9 told the Chinese man to join the queue and scan his bag but he subsequently left due to the long queue. The accused proceeded to the AirAsia's counter 16 ('C16'). PW2 (Peter Ngau Wan) was the guest service officer manning C16 and he had checked in the accused's bag. He had confirmed from the accused's boarding pass that he was a passenger in AirAsia flight AK9275 bound for Kuala Lumpur ('AK9275'). PW2 had accessed the Skyspeed System which showed, on 4th December 2014 at about 10:42:22 hours, a passenger by the name of Leslie Spencer ak Story ('the accused') had checked in a bag bearing serial number 0963436 on AK9275 flight bound to Kuala Lumpur with luggage weight of 24kg. The accused's bag was a Swiss Polo brand, black in colour and in good condition with a padlock and a red ribbon tied to its handle ('the bag').

[2] PW10, PW9 and Cpl Imran had stopped the accused near the Starbucks Miri Airport. After PW10 arrested the accused they then brought him to C16. On PW9's instruction the bag was retrieved from the sorting area located within the Miri Airport. PW4 (Melvin Singh), the ramp agent with AirAsia, was able to locate, identify and retrieve the bag from the luggage tag that was issued to the accused. When the bag was scanned by PW9 in the scanning machine near to the staff entrance also at the ground floor of Miri Airport, he saw not images of birds' nests in the form of 'U'-shape, but the contents looked

suspicious. What followed were rescanning of all the passengers luggage on fight AK9275. It was then discovered five bags were also found to have similar contents as that of the accused's bag. All six bags including the accused's bag together with the accused were initially brought to the police station Miri Airport and later on were taken to the IPD ('District police') Miri for further investigation.

[3] PW3 (Mohd Fauze bin Mohamad), a government chemist, had confirmed all six bags containing the crystalline substance to be methamphetamine defined as dangerous drug under Dangerous Drug Act 1952 ('the DDA'). PW3 had produced his report No 14-FR-U-01459 dated 6 February 2015. The accused's bag containing the drugs is marked as exhibit P19B ('bag P19B').

[4] The accused was subsequently charged under s 39B(1)(a) of the Dangerous Drug Act 1952 punishable under s 39B(2) which read as follows:

> Bahawa kamu pada 4.12.2014, jam lebih kurang 10.40 pagi di Lapangan Terbang dalam Daerah Miri, dalam Negeri Sarawak, telah mengedar dadah berbahaya iaitu Mathamphetamine seberat 15,388.49 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang Sama.

[5] Section 39B(1)(a) states:

> (1) No person shall on his own behalf or on behalf of any person, whether or not such person is in Malaysia —
>
> (a) traffic in a dangerous drug;
>
> (b) .....
>
> (c) .....
>
> (1)

And under s 39B(2):

> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes.
>
> (3) ...

[6] The accused pleaded not guilty. At the close of the prosecution's case 15 witnesses had been called:

(a) PW1 — Rozali bin Dollah (photographer);

(b) PW2 — Peter Ngau Wan (guest service AirAsia);

(c) PW3 — Mohd Fauze bin Mohamad (chemist);

(d) PW4 — Melvin Singh (ramp agent AirAsia);

(e) PW5 — Alvin Sim Boon Hock (AirAsia check in counter);

(f) PW6 — Ting Long Qiang (CCTV technican);

(g) PW7 — Sikri bin Yussop (guest service AirAsia);

(h) PW8 — Faizal bin Mohamad (assistant security AirAsia);

(i) PW9 — Sgt Alwi bin Mustapha (auxiliary police Miri Airport);

(j) PW10 — Cpl Jamadil bin Jamal (policeman Balai Polis Airport Miri);

(k) PW11 — Insp Mohd Said bin Ambotang (police officer narcotic department);

(l) PW12 — Mohd Kamil bin Mohd Yusof (scientific officer);

(m) PW13 — Insp Hamyani binti Abd Hamid (aviation security officer Miri Airport);

(n) PW14 — Zulkarnain Chee Noh (store keeper narcotics department); and

(o) PW15 — Insp Omar bin Kamal (investigation officer).

[7] The prosecution submitted that it is required to satisfy the following ingredients:

(a) that the drugs in the bag ('exh P19B') were in possession of the accused person;

(b) the drugs found were listed in the Dangerous Drugs Act 1952; and

(c) the accused person did traffic methamphetamine inside 19 packages (D1–D19 (Exh P19C1 to P19C11)) found in the bag carried by him ('exh P19B') having total net weight 15,388.49g of methamphetamine (15.388kg) ('the bag').

[8] The prosecution submitted, on the facts of the case mentioned in paras 6–28 of its submission as narrated by both PW9 and PW10 and corroborated by the CCTV recording of counter 16 AirAsia, Miri Airport, the prosecution had proven beyond reasonable doubt that the accused had custody and control of the drugs contained in his bag, as such, he shall be deemed to have the possession of the said drugs and also have the knowledge of the nature of the drugs contained therein by virtue of s 37(d) of the DDA 1952. But the prosecution also submitted that even without the aid of the statutory presumptions the overwhelming evidence had shown that the accused had custody and control over the drugs in this case based on his conduct before and

after his arrest and also coupled with the surrounding circumstances, the accused already knew that he was carrying drugs in his bag ('exh P19B') when he dropped the bag at counter 16 on the date of the incident.

[9] The defence submitted that in proving a prima facie case, the prosecution needs to prove the ingredients under s 39B of the DDA 1952

(a) that the accused had exclusive possession of the drugs and for that, it must be shown that the accused had custody and control of the drugs;

(b) that the accused had knowledge of the drugs in his possession; and

(c) that the weight of the specific drugs must meet the requirements of under the DDA to establish trafficking in addition to actions amounting to trafficking.

[10] The defence however submitted the prosecution had failed to make out a prima facie case against the accused which in summary include: (a) the accused did not have exclusive possession of the drugs found in the said bag P19B; (b) the police did not investigate further on Balabun Anak Tinggal (Balabun), Diana Goh Ying Shih (Diana), Bong Tat Ming (Bong), David Yeo Chin Seng (David) and Chang Yong Siaw (Chang) who were all passengers and owners of bags containing drugs and that such failure to do so had prejudiced the accused; (c) there were no fingerprints of the accused on the 111 packages ('exh P19C1–P19C11') found in the Bag ('P19B'); (d) that the evidence of the prosecution's witnesses namely PW2, PW4, PW5, PW7, PW8, PW9, PW10, PW13 and PW15, had raised serious doubts in the prosecution's case; (e) that the cautioned statement of the accused showed that the accused had no knowledge of the drugs in the bag P19B; (f) the accused was an innocent or mere carrier of the bag P19B and had momentary custody of the same until checking it at C16; and (g) that the presumptions under s 37 of the DDA 1952 could not apply in this case.

[11] Section 180(1) of the Criminal Procedure Code ('CPC') provides that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused. Under s 180(4) of the Criminal Procedure Code, a prima facie case is made out where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[12] The duty of a judge sitting alone, at the close of the case for the prosecution, is to determine as a trier of fact whether the prosecution has made out a prima facie case against the accused person. He must subject the evidence of the prosecution to a maximum evaluation (*Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734). This necessarily involves the court in subjecting all the evidence of the prosecution's witnesses to strict curial

A scrutiny. The credibility of the testimony of all the witnesses for the prosecution must be scrutinised and evaluated with a fine toothcomb. Should more than one inference arise as a result of this exercise, the one favourable to the accused must be adopted.

B **[13]** Before I discuss the issues and the respective submissions I must first address the opening statement ('OS') which the prosecution had tendered at the commencement of the trial. The OS was marked as P3. Paragraph 3 of P3 states: 'The prosecution will prove that the accused was in possession of the said dangerous drugs at the material time. *To prove the element of possession of the said* C *dangerous drugs, the prosecution will rely on direct evidence. To prove the element of trafficking, the prosecution will rely on the presumption under* s 37(d) of the Dangerous Drugs Act 1952 and para 4 states: 'The prosecution will also rely on the scientific and circumstantial evidence in the present case'. (Emphasis D added).

[14] It is my view that since the prosecution had tendered its OS: 'to prove the element of possession of the said dangerous drugs, the prosecution will rely on direct evidence', the prosecution should not now turn around and submits E that it is also relying on the presumption under s 37(d) of the DDA 1952 because in doing so, had not only misled the court but would be unfair and unjust to the accused. The accused had also presented his case along the lines that the prosecution was relying purely on direct evidence. In fact, reading the defence's submission he had submitted that there was no direct evidence to F prove that he had possession of the drugs.

[15] But in the OS, the prosecution had also relied on the presumption under s 37(d) of the DDA 1952 to prove trafficking. To me this is wrong because s 37(d) deals with presumption of possession. The correct section on G presumption of trafficking is s 37(da) and of course 'trafficking' is defined in s 2 of the DDA 1952.

[16] So the question is, whether there is any direct evidence that the accused was in possession of the drugs. As a reminder, the apex court had ruled that it H is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is therefore either in possession or not in possession, although one could be in possession jointly with another or others (see *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209). But what constitutes 'possession' is a question of law. It is however a question of fact I whether in a given case a person can be said to be in possession of something: *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337. Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be

conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of mens rea, without which (except by statute) possession cannot be criminal (*Toh Ah Loh and Mak Thim v Rex* [1949] 15 MLJ 54; [1948] 1 LNS 72). Mere custody and control is not sufficient to establish possession. The prosecution has to establish that the accused had knowledge of the drugs: *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17.

[17] In *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576, Visu Sinnadurai J discussed possession in the following manner:

> Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that:
>
> (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA.

[18] In *Ouseng Sama-Ae v Public Prosecutor* [2011] 4 MLJ 756; [2008] 1 CLJ 337 Gopal Sri Ram JCA (now FCJ) delivering the judgment of this court held:

> Now, in order to establish a prima facie case against the accused by reliance on the presumption under s 37(da) of the Act, the prosecution had to prove: (i) that the accused was in actual physical possession of the drug in question; and (ii) that the accused at the material time had knowledge of the drug found to be in his possession, that is to say that he had mens rea possession (see *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; [1987] 1 LNS 72). The first element was easily established here because the accused did have custody and control of the bag. Indeed, it is quite clear from the evidence that he was exercising dominion over exh P18 at all material times. The only question is whether he had mens rea possession. Like any other mental ingredient in an offence, this is to be inferred from the proved and admitted facts of each case. (Emphasis added).

Now I will discuss whether the accused had physical custody or control of the bag on the 4 December 2014, around 10.40am at the Miri Airport.

CUSTODY OR CONTROL

[19] The prosecution submitted the accused had custody or control of the said bag P19B. The prosecution had relied on the evidence of PW9 who was manning the scanning machine at the ground floor of the Miri Airport on the 4 December 2014 around 10.35am who first saw the accused and a Chinese man bringing their respective trolley bags, which PW9 claimed was suspicious, as their bags did not go through the scanning machine but both had security stickers. PW9 told the Chinese man to queue and have his bag scanned but the

Chinese man left because of the long queue. PW9 however saw the accused had brought his bag to C16 to check in. The prosecution also relied on PW2 who was manning C16 and had checked in the accused's bag. PW2 had confirmed this by checking the accused's IC and boarding pass. PW2 had issued the luggage tag for the accused's bag by placing it on the handle of the bag and also sticking a small portion of it on the boarding pass. PW2 had confirmed from the Skyspeed System that on 4 December 2014 at about 10:42:22 hours, a passenger by the name of Leslie Spencer ak Story ('the accused') had checked in a bag bearing serial number 0963436 on AK9275 flight bound to Kuala Lumpur with luggage weight of 24kg. PW9 had informed PW10 and Cpl Imran about the accused's bag P19B which had a security sticker but not scanned. PW10 arrested the accused and brought him to C16. With the assistant of PW2, PW4, PW8 and PW9 the bag P19B was retrieved from the sorting area. The bag P19B was identified from the luggage tag that was issued by PW2. The prosecution had also relied on the AirAsia's CCTV which showed it was the accused who had checked in his bag at C16.

[20] The defence submitted that once the bag P19B had been checked in by PW2, the accused no longer had access to it and therefore he no longer had custody or control of the same. The defence relied on the evidence of PW2, PW4 and PW5 who are employees of AirAsia, who in cross examination said that all bags once checked in are under the possession, care, custody and control of Miri Airport and that nobody could retrieve the checked in bags except authorised personnel.

[21] It is not disputed that when the accused was arrested by PW10 (Q11637 NOP) at Miri Airport the accused no longer had the bag P19B as he had already checked it in at C16. It is my view that he could not have custody or control of the bag P19B which contained the drugs at that time as PW2, PW4, PW5 and PW8 clearly stated that once a bag is checked in, put on the conveyor belt and transported to the sorting area, the bag P19B was under the custody and control of the airport authorities.

[22] This is what PW2 said on the status of a passenger's bag once it was put on the conveyor belt:

> Q1446: Do you agree that upon a luggage being placed on the conveyer belt at the check in counter, the physical possession of the luggage is under the control and possession of the airport security and not the passenger?
>
> A1452: I agree.

[23] PW4 also agreed that the bag once checked in, the passenger no longer had custody or control of the same:

Q3323: Do you agree that all the bags at the sorting area are within the control of the airport management ie the workers who worked at the sorting area including you?

A3327: Yes.

Q3329: It is not under the control of the passengers?

A3331: No.

PUT3333: That, the possession, care, custody and control of all the bags including the said bags which were taken from the trolley at the sorting area are under possession, care, custody and control of the Miri Malaysia Airport Bhd or you. Do you agree?

A3340: I agree.

PUT3342: That, the moment the bags were checked in at the counter ie AirAsia, the passengers have no access to the bags after that. Do you agree?

A3346: I agree.

Q3348: Do you agree that at that point of time the passenger has no power to deal with the bags any longer at the exclusion of others.

A3351: I agree.

[24] Likewise PW5 said no passengers can retrieve their bags once checked in save escorted by AirAsia security and approved by MAB.

Q5266: Once a luggage was sent to the main conveyer belt or to the sorting area, can the passenger retrieve back their luggage?

A5269: Yes. They can be escorted by AirAsia security and approval by Malaysia Airport Bhd.

[25] PW8, the assistant security officer of AirAsia also agreed that that all the luggage at the sorting area are under the care, custody and control of AirAsia or Malaysia Airport Bhd and no longer the passengers (see Q8085 NOP).

[26] In fact when the accused's bag P19B was retrieved from the sorting area and brought to the scanning machine near the staff's entrance and surrendered to the police, the accused no longer had physical custody or that he had the control over the same. The bag was already under the custody and control of the police. The case of *Public Prosecutor v Goh Hoe Cheong* [2006] MLJU 468; [2007] 7 CLJ 68, is a case in point where it was held: 'In fact and in law, in the absence of any express provisions as soon as a passenger checks in his bag at the check in counter for his scheduled flight, the said bag was in the custody and control of the carrier or its agents, until the same is claimed by the passenger, and the bag thereupon delivered to the passenger'.

[27] But the prosecution's submission was, that the accused was in physical custody of the bag P19B as seen by PW9 when the accused passed by the

scanning machine then proceeding to C16. PW2 also had checked in the accused's bag P19B at C16. PW2 had confirmed from the accused's IC and boarding pass that he was on AK9275. PW2 had issued the bag tag which he placed on the handle of the bag P19B and also placed the tiny version of the bag tag on the boarding pass. When PW4, PW9 and PW10 retrieved the bag P19B from the sorting area it was identified from the bag tag. It is this bag tag issued by PW2 that connected the accused to bag P19B. According to PW5 a bag could identified as belonging to a passenger from the small portion of bag tag sticker stick at the boarding pass of the passenger (QA5592 pp 215–216 NOP). The prosecution therefore had proven that the accused had custody of bag P19B from the time when PW9 saw the accused with the said bag P19B going towards C16 until it was checked in by PW2 at C16. The prosecution also relied on the AirAsia's CCTV which had shown the accused was at C16 checking in the said bag P19B.

WHETHER THE ACCUSED HAD KNOWLEDGE OF THE NATURE OF THE DRUGS FOUND IN THE BAG

[28] The prosecution submitted the accused had knowledge of the drugs in bag P19B. It is all in para 44 of its submission. According to the prosecution, knowledge of the accused could be inferred from the conduct of the accused pre and post arrest and also coupled with surrounding circumstances. The prosecution had referred to *Modjtaba Hosseinzadeh Majid v Public Prosecutor and another appeal* [2016] 2 MLJ 284 where it was held that knowledge forms an integral part of possession which can be established either by direct evidence or by reasonable inference from the surrounding circumstances of the case. The prosecution had also referred to *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 where it was held that proof of knowledge is very often a matter of inference.

[29] It is also the prosecution's submission that the accused already knew that he was carrying drugs in his bag P19B at Miri Airport when he checked it in at C16 on the 4 December 2014. In proving knowledge, the prosecution had inferred to the following facts in its submission. They are reproduced here in verbartim:

(a) it was put to the prosecution's witness ('PW15') the investigation officer (the defence counsel read the accused's caution statement but did not tender the statement as evidence)during the cross examination that the accused simply took his bag ('exh P19B') which had been left by someone somewhere outside the airport building and later the accused carried the said bag and dropped it at counter 16 AirAsia. Nobody forced the accused to take this bag (p 804 of the NOP);

(b) nothing in cross-examination of any prosecution's witnesses to suggest that after simply taking this bag ('exh P19B') outside the airport building, the accused had made any phone call to anybody or David to enquire or verify about the content of the said bag;

(c) nothing in cross-examination of any prosecution's witnesses to suggest that after simply taking this bag ('exh P19B') outside the airport building, the accused had made any phone call to anybody or David to ask for the key for the padlock attached to the said bag;

(d) interesting to note when PW10 asked the accused to call his boss to ask for the key to the bag, the prosecution submits, the accused pretended that he had made phone calls to his boss. Instead of giving any information about the key to the bag, the accused told PW10 that his boss offered monetary reward for the accused to be released. PW10 simply believed the accused had made the phone call to his boss as he could not understand the phone conversation as they were done in Chinese language (the prosecution submits at that particular time, the accused was telling deliberate lie to PW10 that he had made phone calls to his boss). The evidence are very clear based on the phone records retrieved from the three handphones seized from the accused contained in five forensic reports ('exhs P49A, P49B, P49C, P49D and P49E'), there were no outgoing calls recorded made from these three handphones from the period of 10am–5pm on 4 December 2014 (particularly when the accused was still inside the Miri Airport Police Station) to say that the accused had made any call inside Miri Airport police station rightly after been arrested by the police. Thus, the prosecution submits the accused had successfully telling deliberate lie to PW10 and it went unnoticed until the three hand phones seized from the accused were analysed by the police forensic examiner. The lie was deliberate one, made out of fear of truth, it was material to the fact of the accused's case and that lie was borne out by the independent evidence in the form of the above mentioned five police forensic reports of the three phones seized from him;

(e) another blatant lie detected when the accused, in his line of defence through cross-examination of PW10 alleged he made phone calls to his boss and his boss made several monetary offer to the police for him to be released. However, PW10 in his evidence clearly testified, the final offer amounting to RM1.2m was made by the accused himself without any phone call to his boss (pp 534–535 of the NOP. The prosecution submits, based on the above mentioned facts, all alleged phone calls by the accused were merely blatant lie. Actually, the accused did not call anybody inside the Miri Airport Police Station on that particular day and the monetary offer did not come from his alleged boss. If the accused could make RM1.2m offer by himself ie extra RM200,000

from second last offer, it was illogical for the accused to say that all previous offers amounting to RM10,000, RM50,000 etc were from his boss and not from him. The accused himself had RM200,000 to offer to PW10;

(f) another interesting fact was the conduct of the accused during the inspection of his bag (exh P19B). He was calm even after packages of drugs were found inside his own bag. There was not even a shocking reaction even though the accused told the police earlier that the content of the bag was merely birds' nest. The prosecution submits, as a reasonable man are we going to react the same? Certainly not! Any reasonable man would be shock if the content of their bag that they believed to contain something suddenly changed to something else. The prosecution submits, the accused's reaction in the present case only proved that the he already knew about the presence of the drugs inside his bag. That is why, there is nothing to be shocked of;

(g) even though the accused had been propagating to the police during his arrest and police investigation that the content of his bag (exh P19B) was merely birds' nest, but suddenly on the 1 July 2015, the accused lodged a police report MIRI/00694/15 (exh D11) and state that: (a) he did not know the content of his bag; (b) did not make any monetary offer to the police; (c) did not say that the offers were from his boss and (d) merely said that the bag was not his. In this report as well, the accused did not even mention about his alleged boss by the name of 'David'. Among others the accused states in his police report:

> Saya mengatakan bahawa saya tidak pernah memberi apa-apa tawaran kepada mana-mana pihak termasuk memberi tawaran sebanyak RM1.2 juta kepada L/KPL Jamadil bin Jamal seperti dalam laporan polis tersebut kerana ketika itu saya tidak mempunyai apa-apa pengetahuan tentang kandungan beg-beg tersebut dan beg-beg tersebut adalah bukan milik saya.

(h) based on his report (exh D11) alone, the accused had given serious and unexplained contradictory evidence which led to following questions:

(i) Did the accused know the content of his bag was birds' nest as he told the police and the court or he knew nothing about the content of his bag as per his report lodged in 1 July 2015?

(ii) Did his boss make the monetary offer through him as he told the court or did not make any offer to anybody as per his own report? The prosecution submits, the lodgement of this report and the contradictory evidence put forward by the accused clearly showed that the accused was telling deliberate lies to the police and even to the court. Thus, it is highly unreasonable for the accused to plead in future that this particular report was lodged inadvertently; and

(i) the prosecution submits, based on the above mentioned facts, the accused had been telling deliberate lies to the police and also to the court through his cross examination of prosecution witnesses which led to irresistible conclusion that the accused had the knowledge of the nature of drugs in his bag (exh P19B) and all these deliberate lies by the accused amounting to corroborative evidence of his guilt.

[30] The prosecution submitted that such deliberate lies to the police and the court provide corroboration that the accused had knowledge of the nature of the drugs in the bag P19B. The prosecution had referred to the case of *Uchenna Paul Nwokolo v Public Prosecutor* [2015] MLJU 692.

[31] In summary the defence submitted the accused had no knowledge of the nature of the drugs in the bag P19B which can be inferred from the facts and the evidence. The accused did not purchase his plane ticket. The booking under FHRZ5E was done by the said Chang and paid by him. It was Chang who had obtained the boarding pass on 3 December 2014 around 12.46pm. The bag P19B was only given to the accused on the morning of the 4 December 2014 at the Miri Airport which was checked in at C16. The bag P19B was already scanned and with security sticker. The bag P19B was padlocked and the key was not found with the accused but with David. The accused was informed by David that the bag P19B contained birds' nest. David was to pay RM3,500 to the accused for checking in the bag P19B. The accused told PW9, PW10 and PW15 the bag P19B contained birds' nest and that the bag P19B belonged to the boss (David). The bag P19B was identical in all aspect to the bag P21B belonging to David. All six bags including the bag P19B were also similar in sizes and with similar padlocks. When the accused was stopped and arrested by PW9, PW10, Cpl Imran, was cooperative, was calm, not in shock, not scared or did not make any attempts to escape. There are no finger prints of the accused in bag P19B or the contents therein. The accused had made exculpatory statement to the police in his cautioned statement. Balabun, Diana, Bong, David and Chang who had escaped were all passengers in AK9275 and owners of bags containing drugs.

[32] But I am concerned that the prosecution had also relied on the conduct of the accused after he was arrested. There is no doubt that the accused was arrested on the 4 December 2014 around approximately 10.40 am by PW10 (see exh P36) after he had checked in bag P19B at C16. PW10 arrested the accused in front of the toilet area not far from the Starbucks (Q11621 p 455 NOP). These are PW10's answers on the arrest of the accused.

Q11637: When you approached the accused, what did you do?

A11639: I arrested the accused and asked for his IC and his boarding pass.

Q11642: How did you arrest the accused?

A11643: I grabbed his left arm.

[33] There was no evidence led by the prosecution that a caution was administered on the accused by PW10 when he had allegedly arrested the accused on 4 December 2014 around 10.40 am. However, when the cautioned statement of the accused was taken on 7 December 2014, only then the caution was administered as a matter of course under s 37B of the DDA 1952 (Q19412 NOP).

[34] In *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46; [2007] 4 CLJ 114, Gopal Sri Ram JCA (as he then was) had, inter alia, held:

> [7] How mens rea possession is to be proved depends on the facts and surrounding circumstances of each case. In the present instance, the learned judge relied on the appellant's statements made before being cautioned. And that really is the nub of the first point of importance in this case.
>
> [8] The appellant's case is that he was already under arrest when he made the incriminating statements. Whether a person is under arrest is an issue of inferential fact. In other words it is a fact that is to be reasonably inferred from proved or admitted facts. No better passage than that from the judgment of Shankar J in *Public Prosecutor v Kang Ho Soh* [1992] 1 MLJ 360; [1991] 3 CLJ 2914; [1991] 3 CLJ Rep 557 is needed to bring home the point:
>
> > With respect to the industry of counsel and the DPP I feel I ought to say something here about the system of judicial precedent. *That statements made by an accused person after his arrest are inadmissible, unless the statutory preconditions laid down* by s 37A of the Act are satisfied, is of course a matter of law. But whether in a particular case a person was under actual arrest at a given moment in time is a question of fact, to be decided according to the circumstances of each case. It is well established that the reasons given by a judge for arriving at a conclusion of fact, is not to be treated as law and therefore citable. Failure to appreciate this can result in the court being crushed under the weight of its own reports (see *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 at pp 757, 758, 759 and 761).
> >
> > In the present case, the evidence makes it clear that on the basis of his information received, PW2 was prepared to back up with physical force, his order to the accused to stop and open the door with the direct objective that the boot of the car be opened for search. And he did so.
> >
> > Consequently, I ruled that everything the accused said from the moment PW2 laid hands on him was inadmissible. In retrospect I would state it is my opinion that since PW2 had already successfully ordered Kang to stop and open the car door, and *since he had formed the intention to compel Kang to move to his orders from that point in time, it would be more correct to exclude everything the accused said from then on*.
> >
> > As to all the various authorities cited to me I am constrained to say that I regard each of them as being a decision on the facts of that particular case on the issue

> as to when a person is to be regarded as being under arrest for the purpose of s 37A of the Act. I have not found the distinction between 'constructive arrest' and 'legal arrest' helpful. It was contended by the learned DPP that in the present case Kang could only be regarded as being under arrest when PW2 so ordered after Kang allegedly admitted to the knowledge of the contents of the packages. With respect I do not agree that stopping a person to make enquiries, is the same as stopping a particular person on the basis of prior information received that that particular person has committed a particular offence. (Emphasis added).
>
> [9] So too here. It is clear from the evidence that the appellant was under arrest the moment PW8 turned off the engine and took possession of the keys. With his customary frankness the learned deputy conceded — and rightly — that the appellant was under arrest when he made the statements in question. That is why the learned judge held these statements to be inadmissible. Unfortunately, when he came to consider the issue of mens rea possession, he relied on these excluded statements to hold that the appellant had knowledge of the nature of the drug in question and was therefore in possession of it. This is clearly a misdirection. It is a cardinal principle of our criminal justice system that any findings that are made by a court must be based on legally admissible evidence. Otherwise there is absent a fair trial, that is to say, a trial conducted in accordance with law.

[35] I am also concerned there were oral statements made by the accused after his arrest. That statements were made during conversation between the accused and PW10 at the police station Miri Airport. The prosecution had placed strong reliance on this conversation between the accused and PW10, namely the alleged offers by the accused of moneys after the accused had allegedly called his boss (which we now know to be David) which the prosecution submitted, were all deliberate lies as there were no such phone calls being made, as evidence of the forensic reports on the accused's hand phones did not show such calls were made to David or at all.

[36] The conversation as testified by PW10 during the trial pertained to the accused offering payments of moneys initially from RM20,000 and increasing to RM1.2m after the accused had allegedly made phone calls to his boss David. PW10 also said he told PW9, Cpl Imran and Cpl Ng Mee Hua (Cpl Ng) about these offers, yet PW9 did not testify to this when giving his evidence and both Cpl Imran and Cpl Ng were also not called to corroborate that PW10 had told them of the accused's offers. PW10 also said he did not understand the phone conversation because the accused was speaking in Chinese. But no evidence was led whether the accused who is an Iban was able to speak in Chinese. During the trial PW10 also said the accused told him the contents of the bag P19B were birds' nests.

[37] In his police report dated 4 December 2014 which was tendered as exhs P36, PW10 said he arrested the accused around 10.40am that day. In P36, PW10 only reported that the accused had offered him RM1.2m which he had

informed Cpl Ng but in P36 there were no mentioned of the offers of RM20,000, RM50,000, RM200,000 etc made by the accused as well as those so called telephone calls he made to his boss in Chinese language which PW10 had testified in court. It was also not stated in P36 that the accused had told PW10 that the bag P19B contained birds' nest. I cannot help noticing that so much of information were said by PW10 in court yet in his police report P36, he only mentioned that the accused had allegedly offered him the sum of RM1.2m and that he had told Cpl Ng about it. This to me showed that PW10 had been selective in his police report P36.

[38] I am however of the view that there were no such offers of payment of money to PW10 because when the accused heard of this during the trial, the accused had immediately lodged a police report D11 to deny the same which he was perfectly entitled to do so. This D11 also showed that the accused actually had no knowledge of the contents of P19B as he only knew from David who had told him that the contents were birds' nest. But the point is this, since the defence had challenged this offer of RM1.2m allegedly made by the accused to PW10, the prosecution should have called Cpl Ng. She would have corroborated PW10's evidence on the RM1.2m as he had reported in P36 that he had told Cpl Ng about it. But more importantly I am of the view that the so called offer of RM1.2m which was allegedly made by the accused after his arrest without him being cautioned is inadmissible (see *Lim Hock Boon*).

[39] It has been held that knowledge, which is a mental element involving one's state of mind, undoubtedly is always difficult to prove by direct evidence in the absence of an express admission. However, it is trite that knowledge, though cannot be proved by direct evidence, it would be quite sufficient to prove facts from which it could be properly inferred that the accused knew or had the requisite knowledge that he had prohibited drugs in his custody or control as decided by a long line of cases — (see *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795; [1998] 1 CLJ 37; *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 597; *Samundee Devan a/l Muthu Kerishnan v Public Prosecutor* [2010] 2 MLJ 607; [2010] 3 CLJ 269; *Public Prosecutor v Salleh bin Zakaria & Anor* [2010] 4 MLJ 25; [2010] 4 CLJ 671; *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337). These cases were all in similar vein ie knowledge can be proved by inference from the surrounding facts and circumstances.

[40] Since there is no direct evidence to prove the accused knew of the nature of the drugs in the bag P19B, such knowledge has to be adduced by inference from the surrounding facts and circumstances. The court is therefore required to consider the evidence of all prosecution's witnesses including the evidence of PW15, the IO of this case who had read the investigation papers including the cautioned statement ('CS') of the accused. The CS of the accused was in fact

referred to PW15 during the trail which was admitted by PW15 to have been recorded by Insp Hezron @ Ron bin Ghani (Insp Hezron) on 7 December 2014. The CS was not tendered but it was read to PW15 by the defence. The accused had given his CS three days after he was arrested for the alleged drugs found in the bag P19B. The prosecution however had taken issue of the defence not having tendered the CS. The prosecution had put the court to notice that the prosecution was handicapped if the CS was not tendered. But then again there is nothing to stop the prosecution from tendering the CS through Insp Hezron if the prosecution was really serious in challenging the contents thereof.

[41] I find that PW15 had read the accused CS (Q20046 p 804 NOP). PW15 had to read the CS of the accused as well as all statements taken from all the prosecution witnesses. He is required to do so in order to complete his investigation on the drugs that were allegedly found in the accused's possession. To me the PW15 as the IO of the case is an essential witness. It has been held failure to call him is fatal (*Teoh Hoe Chye v Public Prosecutor Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220). The evidence of the IO is far from being formal. His duties are many and varied but the single most important duty is to investigate all relevant aspects of the case, irrespective of whether the results of the investigation favour the prosecution or the defence. The IO has to be fair whose primary duty is to ascertain the truth (see *Gollapa Avana Naik & Ors v The State* [1968] Cri LJ 929). The Indian court in *Jamuna Chaudhary & Ors v State of Bihar* [1974] 3 SCC 774 emphasised: 'The duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth'.

[42] Now an exculpatory cautioned statement represents an accused person's first disclosure of his defence while under investigation. If it contains the necessary particulars that support his innocence the CS is the accused's '*Alcontara* Notice' (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209) and it carries great weight. Investigation must be carried out on the disclosure and the onus is shifted to the prosecution to rebut the same. A failure to consider the cautioned statement is a serious misdirection warranting appellate interference (see *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282; [2014] 1 MLRA 387).

[43] It was also held that the CS of the appellant formed part of the evidence before the court and it was the duty of the trial judge to consider the CS *Public Prosecutor v Mohammadreza Aslanzad & Anor and another appeal* [2015] MLJU 2216.

[44] In *Chukwudi Hassan lwn PP* [2015] MLJU 847; [2015] 8 CLJ 353 the

court held, per Dato' Abdul Rahman Sebli JCA: 'If the cautioned statement of the appellant was accepted as true by the trail judge, the appellant was definitely entitled to an order of discharge and acquittal because without the evidence of knowledge, the appellant did not commit any offence. In connection to this, it was undisputed that the trial judge failed to consider the contents of the appellant's cautioned statement. This failure brought about injustice to the appellant because the appellant had missed an opportunity to be found not guilty on the charge'.

[45] The defence had referred to PW15 to some statements of the accused in the CS which are exculpatory in nature. They are as follows:

PW15 replied on accused's Cautioned Statement (CS)

Q20046: Do you agree that you have read the caution statement of the accused taken on 7.12.2014?

A20049: Yes.

Q20213: Did you as an IO read carefully the caution statement of the accused?

A20215: Yes.

Q20051: Refer to witness caution statement. DC reads caution statement from page 1 starting from the words 'Pada 7.12.2014 ...' page 2 the last paragraph starting from 'cuba ceritakan latar belakang kamu', at page 3 'apakah yang hendak kamu katakan kepada saya ...' until the end of paragraph at page 3 and page 4 first, second, third questions and answers until the word '... RM3,500.00.'

Do you agree that the accused gave a long statement exploring under what circumstances he had the bag with him based on the caution statement?

A20065: I agree.

Q20042: This caution statement was supplied to the defence earlier?

A20044: Yes.

Q19477: Do you agree that the accused did not know the content in the bag containing drugs based on caution statement?

A19485: Yes.

Q20072: Do you agree that the accused said that he was informed by David that the bag contained birds' nests based on caution statement?

A20076: Yes.

Q20078: Do you agree that he was asked by David to carry the bag containing birds' nests from Miri to KL based on the caution statement?

A20082: Yes.

Q20084: Do you agree that the accused said that the bag was locked and he had no key to the bag based on the caution statement?

A20087: Yes.

Q20089: Do you agree that the police had to force open the bag as there was no key to the bag based on the caution statement?

A20092: Yes.

Q20119: Do you agree that David's name was mentioned by the accused in his caution statement?

A20122: Yes.

Q20124: Do you agree that based on the accused caution statement the accused was told by David that the bag need not be scanned and instructed the accused to check in the bag straight away?

A20129: I agree.

Q20139: Do you agree that based on the CS of the accused the accused only had momentary custody of the bag which belongs to David ie from outside the airport to check in counter?

A20144: I agree.

Q20157: Do you agree that based on caution statement, the accused was asked by David to carry the bag containing birds' nests as told by David and David paid him RM3,500?

A20162: I agree.

Q20171: Do you agree that based on caution statement with represents the accused defence disclosed during the stage police investigation the real or actual trafficker is David?

A20176: I agree.

Q20178: Do you agree that based on caution statement, the accused said that he is innocent carrier with no knowledge that the bag contained dangerous drugs?

A20182: I agree.

Q20197: Do you agree that by reason of the stance taken by the accused in his caution statement, David is the most important witness?

A20201: I agree.

PUT20293: That based on caution statement of the accused and what the accused said in the caution statement, the accused is innocent.

A20297: I agree.

[46] The prosecution had submitted the accused's CS had not been tendered as exhibit. Should not the court consider PW15's evidence given during the trial namely, his views of the accused's statements in the CS and his answers to questions asked of him during the trial? After all PW15's views were based on his analysis of the case. In any case the prosecution had subsequently

re-examined PW15 on his answers to the defence cross examination on the CS. The point is that PW15's evidence is now before the court, they are all in the notes of proceeding. I am of the view that the court has to consider all the evidence of the prosecution's witnesses, subject them to strict crucial scrutiny and to be evaluated with a fine toothcomb. The law requires the court to subject all of the evidence of the prosecution to a maximum evaluation and should there be more than one inference arising as a result of this exercise, the accused should be given the benefit of the doubt.

[47] I am aware that an accused's exculpatory statement cannot form as the sole basis for acquittal at the end of case of the prosecution. In *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233, the Federal Court made it clear that a purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it and the court further added that in considering whether there is a case to answer, the trial judge ought not take account such statement as the basis for founding an order or acquittal or discharge. But in *Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316, the cautioned statement which was tendered by the defence during the prosecution's case was considered by the court. It must however be noted that the exculpatory cautioned statement was not made the sole basis for his acquittal as there were other defects in the case for the prosecution namely, possession was not proven and the chemist was not proved to be expert. (Emphasis added).

[48] The prosecution submitted that the accused had knowledge of the drugs. The defence submitted the accused had no knowledge of the nature of the drugs found in the bag P19B. I will start by discussing the existence of David.

THE EXISTENCE OF DAVID

[49] The existence of David is important to the defence. There is therefore a need to establish whether this David was the same as David Yeo Chin Seng, a real person and a passenger in flight AK9275. In the CS the accused had referred one David who had given to him the bag P19B outside the Miri Airport that morning of the 4 December 2014. David had told the accused to bring the bag P19B to the Airasis check in counter and the accused had checked in the bag in C16. It was David who told the accused that the bag P19B contained birds' nest. The accused claimed David to be his boss. According to PW15 from the accused's hand phones David name is mentioned in the list of contact (QA18870 p 758 NOP). The accused was therefore in contact with David.

[50] According to PW2, a plane ticket under booking No E85F5S was issued to David Yeo Chin Seng and Bong Tat Ming (QA1630 and 1634 p 63 NOP) and two bags were checked in under David Yeo Chin Seng QA1660 p 64 NOP). According to PW5, passengers which included David Yeo Chin Seng had checked in fight AK9275 (QA6365 p 245 NOP). PW5 also said once a passenger had checked in, a sequence number would be given to each passenger and David Yeo Chin Seng was given sequence number 64 (QA6370 pp 245–246 NOP). PW5 agreed that those five passengers in flight AK9275 were real persons and are in existence (QA6616 p 255 NOP). PW15 also agreed from his investigation that David is a real person.

[51] Reading D2B(1), travel and service centre AirAsia had issued ticket reservation E85F5S, dated 3 December 2014 at 12:56:18 for Bong Tat Ming and David Yeo Chin Seng, assigned seats 8E and 9E respectively and both had checked in around 12.58 pm at the AirAsia kiosk Miri Airport. On the 4 December 2014 at 10:33:38 David had checked in two bags, two luggage tags 0962258 (24kg) and 0962266 (22kg) were issued and around 11.37am both baggages were removed. According to PW5 seat number 9D was allotted to the accused and seat number 9C to passenger Chang Yong Siaw (QA5769 p 222 NOP). Both David and the accused was seated next to each other in flight AK9275. David was also seen in the footage of the AirAsia's CCTV.

[52] Based on the evidence of PW2, PW5 and PW15 I find that this David referred to by the accused in the CS and David Yeo Chin Seng are one and the same person.

THE BAG P19B

[53] This bag P19B had been described as a Swiss Polo brand and black in colour. When the bag P19B was seized it was zipped and with a padlock. There was also a red ribbon tied to the top handle. When the bag P19B was forced opened by PW10 it contained drugs. PW3 confirmed the drugs to be methamphetamine defined as dangerous drug under Dangerous Drug Act 1952 ('the DDA 1952').

DAVID IS THE OWNER OF THE BAG P19B

[54] The accused had stated in the CS, David is the owner of P19B. PW15 agreed that this was so in the CS. The accused also stated that he received P19B that morning of the 4 December 2014 from David who had told him to take the bag P19B straight to the AirAsia's counter check which the accused did at C16. The accused did not scan the bag P19B as it already had a security sticker. David had also told the accused that P19B contained birds' nest. The accused had stated in the CS that the bag P19B was locked with a padlock and the key

was with David. When PW9 and PW10 searched the accused there was no key of the padlock found on him. The accused had stated in the CS that David would pay him RM3,500 for carrying the bag P19B. David was in contact with the accused as evidence of the forensic reports on the accused's hand phones. Accused had no knowledge of the drugs in bag P19B. There were no finger prints of the accused on those plastic containing the drugs. PW15 in fact agreed that no fingerprints of the accused found on the exhibits (QA20317 p 814 NOP). David was carrying the same type of bag as that of the accused. PW3 said bag P19B and bag P21B were of the same brand name, the size, the color, the material and with red ribbon attached to the handle of the respective bags (QA4929 p 190 NOP). PW4 said both P19B and P21B are of the same brand of Swiss Polo (Q5061 p 195 NOP). PW3 also agreed that the padlocks to the accused bag P19B and David's bag P21B and four others were of the same brand, colour and size (QA4970 pp 191–192 NOP). There is strong inference that the bag P19B belonged to David.

THE ACCUSED HAS NO KNOWLEDGE OF THE CONTENTS OF BAG P19B

[55] Again I shall start with the statements of the accused in his CS as recorded by Insp Heron which was made three days after his arrest. The accused had narrated in his CS that he had received bag P19B from David at the Miri Airport on the 4 December 2014. David had told the accused that the bag P19B contained birds' nest and told the accused to go straight to AirAsia's check in counter. The accused had checked in the bag P19B at C16. The accused did not have the key to the padlock of the bag P19B. The IO agreed all these were stated in the CS. The prosecution's contention that the accused should or could have checked the contents of the bag P19B was impossible to do because the accused did not have the key to the padlock. Further the bag P19B was given to the accused only that morning on 4 December 2014. The accused had no reason not to believe that the bag P19B contained birds' nest because this was what David had told the accused. The accused was not forced to carry the bag P19B because the accused agreed to do so since David was paying him RM3,500. When PW10 showed the accused the crystalline stones and asked him about it, the accused answered he did not know (QA11990 p 469 NOP). There were also no finger prints of the accused on the plastic containing the drugs found in bag P19B. No clothing of the accused were found in bag P19B. The accused had immediately made police report D11 to deny that he made such offers of money to PW10 and to state that he did not know the contents of the bag P19B. D11 was made contemporaneously upon hearing PW10's evidence on the alleged offers of money purportedly made to PW10. It is my view that the accused did not know of the nature of the drugs found in bag P19B.

THE ACCUSED TOLD PW9, PW10 AND INSP HEZRON BAG P19B CONTAINED BIRDS' NEST

[56] Having checked in the bag P19B at C16 the accused was then stopped by PW9, PW10 and Cpl Imran near the Starbucks. PW10 arrested the accused. He was asked about the contents of bag P19B. The accused told PW9 and PW10 it was birds' nest. The accused had also stated in the CS that the bag P19B contained birds' nest. The accused was consistent in his answer that the bag P19B contained birds' nest. I am of the view that the accused genuinely believe that the bag P19B contained birds' nest as David had told him. The accused statement that it was birds' nest that he was carrying in the bag P19B was consistent as he told PW9, PW10 and also in his CS.

THE DEMEANOUR OF THE ACCUSED

[57] When the accused was told to stop by PW9, PW10 and Cpl Imran, he stopped. There was no sign that the accused was scared or panicky or that he had attempted to run or escape. According to both PW9 and PW10 the accused was calm. The accused in fact stopped and answered PW10's question on the contents of bag P19B. According to PW9 and PW10, the accused was very cooperative. The accused was not being difficult when asked for his IC and boarding pass. At C16 when he was asked to give his IC and boarding pass the accused complied without any complaint unlike the Chinese man who when he was stopped by PW9 to scan his bag had some exchange of words with PW9 that he had already scanned his bag. The Chinese man then left the airport. The accused could have followed the Chinese man and also left the airport if he had known of the drugs in bag P19B. Incidentally this was the Chinese man which PW9 saw with the accused which PW9 claimed were looking suspicious passing by the scanning machine. But PW9 in cross examination had said he was suspicious of the bags carried by the accused and the Chinese man because the bags had security sticker though not scanned. The AirAsia's CCTV also showed the accused was calm, not scared and very cooperative to the police and the airport authorities.

THE ACCUSED MERE OR MOMENTARILY CARRIER OF BAG P19B

[58] To answer this I shall also start with the accused statement in his CS where he said David gave the bag P19B on the 4 December 2014 and told the accused to check it in at AirAsia's counter which he did so at C16. It was also in his CS that the accused had stated he was a mere or momentarily carrier of bag P19B. We have established that David was a real person and a passenger in flight AK9275. The accused had referred to him as the boss. There is no doubt that David was communicating with the accused as evidence of the forensic reports on the hand phones seized from the accused. The accused said in his CS that David would pay him RM3,500 to bring the bag P19B to KL. The accused

did not know what he actually was carrying in the bag P19B. What he knew was that the bag P19B contained birds' nest as told to him by David. The accused respond and his answer was birds' nest when asked by PW9 and PW10 were consistent with his no knowledge of the drugs in bag P19B.

ANALYSIS OF THE CASE

[59] From my analysis of the prosecution evidence, I find that all had been arranged for the accused to enable him to bring and check in the bag P19B at the AirAsia check in counter. The evidence of PW2 and PW5 showed that a ticket was bought for the accused with another passenger Yong Siew Chang under booking number FHRZ5E, the accused was to sit on seat 9F. The ticket was bought on 3 December 2104 around 12.40pm or thereabout and they were checked in on the same day around 12:46:37 hours and 12:46:38 hours. Incidentally or coincidently or was it pre-arranged that David was also to sit on seat 9E next to the accused. Incidentally or coincidently or pre-arranged that the ticket booking no E85F5S was also purchased on the 3 December 2014 around 12.40pm and checked in at the AirAsia kiosk around 12.49pm. PW5 also said the purchase of ticket could be done by any passenger and also checked in by any passenger so long as that passenger know the booking number. Is it also coincidently or pre-arranged that the accused bag P19B and David's bag P21B were both similar in all aspects of brand size, colour and with the red ribbon tied to the respective handle of the bags (Q13225 pp 516–517 NOP). What does this tell us. It can either be that P19B belonged to the accused or David. But to me it is reasonable to infer that P19B belonged to David. David was in charge, after all the accused had referred to him as the boss. I am also of the view that the red ribbon on the handle of P19B was to be a special identification so that when the bag P19B reached KL and placed on the carousel, David could identify the bag P19B very quickly, collect it and exit the KL airport.

[60] But there is also the bigger picture here. The evidence had unfolded that there were six bags almost same size, all dark in colour, branded, with similar padlocks and containing drugs (Q13081 and 13092 p 511 NOP). There were seven passengers including the accused who all had checked in flight AK9275. But except the accused the other six had escaped. What does this tell us. This tells us that David and the other passengers Belabun Anak Tinggal, Diana Goh Ying Shih, Bong Tat Ming, Yong Siaw Chang and Yun Chun Fook who were carrying bags with drugs knew of the drugs otherwise why were they not arrested. David and the others were all able to escape though they had already checked in for flight AK9275. But alas the accused was caught because he had no knowledge of the contents of the bag P19B he was asked to carry and checked at the AirAsia check in counter. All that he knew was that he was

carrying a bag containing birds' nest as told to him by David, the boss for which he was to be paid RM3,500 which is substantial payment for merely dropping the bag P19B at C16.

CONCLUSION

[61] Before I conclude I have to say that the investigation done here is very much to be desired. For a start the IO considered himself as junior IO having handled only few cases of drugs investigation (Q19252 and A19254 p 773 NOP). I cannot understand why the narcotics department was not alerted immediately after the accused was detained. With extra policemen placed around the airport, the other six suspects who may well be the traffickers could have been caught and arrested and their evidence too would definitely assist the court in this case. There was also poor handling of the drugs. The IO said some of those who had handled the exhibits were not using hand gloves and therefore there was no finger prints of the accused found. But without this evidence it goes to show that the accused had not handled the drugs therefore the accused had no knowledge of the drugs found in bag P19B. The accused is entitled to such benefit of doubt. On poor handling of the investigation and lack of secrecy the fact that some photographs of the exhibit were leaked to the public through whatsapp application and facebook on the same date 4 December 2014 spoke volume of that (Q20453 and A20458 NOP). There was also lacking in knowledge of the process of arresting. PW10 did not at all administer a caution on the accused when he arrested the accused. The other point that I have to say here is the non-functioning of the CCTV in the Miri Airport. This CCTV is very important for the airport as I consider all airports as security areas. The CCTV would have really assisted the court in confirming who had checked in at the kiosk machine, whether it was David who had given the bag P19B to the accused that morning 4 December 2014. The CCTV could have assisted the police to locate where the other six suspects were for the purpose of catching them. The other matter pertains to further investigation of the other suspects. I have to say that all these suspects are locals. The police have their addresses in Miri. Sadly, there were no further development of the investigation of the six other suspects. When PW15 was asked what further action the police took to trace the suspects he answered doing nothing (Q19162 and A19164 NOP). PW15 also did not investigate David based on the phones record of the accused showing bro David 1, bro David 2, bro David 3 and bro David 4 (Q20225 and A20229 NOP) yet he agreed as IO all relevant aspect of the case must be investigated (Q20231 and A20231 NOP). In the premises based on the evidence thus far adduced it is my finding that the accused had no knowledge of the drugs found in bag P19B. The prosecution had failed to prove possession and trafficking. There is therefore no prima facie case for me to call for the defence of the accused. I therefore acquit and discharge the accused.

A *Acussed acquitted and discharged.*

Reported by Afiq Mohamad Noor

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